The role of formal principles in legal reasoning

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Introduction

Since the groundbreaking work done in this respect by DWORKIN[1] and ALEXY,[2] it has become commonplace in legal theory that the content of legal rules are not merely what the legal norm creator ultimately mandated by the *rule of recognition*[3] wants it to be[4]. Conversely, there are legal principles lying at the root of every legal rule that consequently play an important role during the interpretation and application of this rule. Within the broad category of legal principles, several distinctions can be made. For example, within the category of legal principles *sensu lato*, DWORKIN distinguishes between policies and legal principles *sensu stricto*[5]. A *policy* he then describes as a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community. And a *principle* (in the strict sense) he describes as a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. This distinction is crucial to DWORKIN's theory of rights, since judicial rights in this theory are only determined by balancing different principles (*sensu stricto*), and not by balancing principles with policies[6]. Hence DWORKIN's expression: '*rights as trumps*'[7].

In this contribution, however, following ALEXY in the postscript to the English edition of his pivotal book *A theory of constitutional rights*, I will distinguish between *substantive principles* and *formal principles*[8]. In a nutshell, I will argue that this distinction is key to understanding the scope of judicial discretion and the limits to that scope. In the *first section*, I will give a first tentative definition of a formal principle. This definition will be fleshed out in the further sections of this chapter. In the *second section*, I will make a sketch of the process of legal reasoning. This section will shed some first light on the different origins of judicial discretion on the one hand and the way in which formal principles place a break on this discretion on the other hand. In the next two sections, these two features will then further be examined. In the *third section*, I will dig deeper into the process of *balancing*, as this process will have been identified in the previous section as the main source of judicial discretion. In the *fourth section*, I will perform an in-depth analysis on the different ways in which formal principles limit this judicial discretion. I will end with a conclusion.

1. Definition of a formal principle

The main division of principles I will use in this chapter, will thus be the distinction between *substantive principles* and *formal principles*. Substantive principles can be descripted as principles that manifest a fixed material ideal that needs to be attained as far as *factually* and *judicially* possible[9]. Substantive principles thus optimize concrete substantive legal interests, such as life, freedom or property[10]. Different substantive principles and the contest between them therefore directly generate the material content of legal rules[11]. Some of the substantive principles underlying criminal law are for example the principle that crime should not pay off that underlies the law of confiscation, or the principle of the presumption of innocence that underlies the law of evidence in criminal procedure. Formal principles on the other hand can be described as principles that do not directly fix the material content of a legal rule, but that nonetheless have a significant – albeit indirect – impact on the legal meaning of a legal rule. This is because they modulate the situations in which and the degree to

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[1] Especially DWORKIN's article '*The model of rules*' has been pivotal in this respect: R. DWORKIN, "The model of rules", *University of Chicago Law Review*, 35, 1967-1968, 14-46. This article was also reproduced as chapter two of DWORKIN's book '*Taking rights seriously*': R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 14-45.
[2] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 462 p.
[3] On the 'rule of recognition', see: H.L.A HART, *The concept of law*, 3th ed., Oxford, Oxford University Press, 2012, 100-110.
[4] L. ALEXANDER, "Legal objectivity and the illusion of legal principles" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (115) 117. Even HART – whom DWORKIN precisely criticized for not having taken into account the existence of legal principles – expressly recognized the existence thereof in the postscript to his book '*The concept of the law*', and went to a great length in order to fit them into his theory on the rule of recognition: H.L.A HART, *The concept of law*, 3th ed., Oxford, Oxford University Press, 2012, 259-268.
[5] R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 22.
[6] *Ibid.*, 81-130; R. DWORKIN, *A matter of principle*, Cambridge Massachusetts, Harvard University Press, 1985, 9-32.
[7] R. DWORKIN, "Rights as trumps" in J. WALDRON (ed.), *Theories of rights*, Oxford, Oxford University Press, 1984, 153-167.
[8] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 414-425.
[9] *Ibid.*, 47-48.
[10] M. JESTAEDT, "The doctrine of balancing – its strengths and weaknesses" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (152) 156.
[11] J.-H. KLEMENT, "Common law thinking in German jurisprudence – on Alexy's principles theory" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (173) 178-179.

which a legal rule can be fitted to the present-day legal context of that rule[12]. Formal principles thus can be characterized as principles that regulate the scope of competence for a judge to mold the content of legal rules when he applies those rules.

Two main categories of formal principles can moreover be identified. The first main category relates to the division of state power between the different branches of government, and especially the relationship between the political and the judiciary branches. Examples of this type of formal principles, are the principle of legality, or the principle of the separation of powers and the related idea that it is for the legislative and not the judiciary branch of government to define the important socio-economic choices in society. The second main category relates to theories about the protection of human rights of the individual. Some principles of judicial protection in fact put a brake on the competence of the judge to give a new (and innovative) solution to a legal case. Examples of this type of formal principles, are the principle of legal certainty and the principle of formal equality[13].

2. The process of legal adjudication

Most legal cases actually are rather straightforward. And this is because – to phrase HART – they can be situated in the *core* of a legal rule[14]. In these cases, the legal rule itself is indeed clear and not under scrutiny. The main issue revolves around the factual circumstances of the concrete case, that is to say on whether these factual circumstances are sufficiently proven and whether they can be brought under the set of legal rules applicable to the case. In a minority of cases however, the legal rule itself will be called into question and be put under scrutiny. In the words of DWORKIN, these are *hard cases*,[15] and in the words of HART, these cases are situated in the *penumbra* of the applicable rule[16]. In this section, I will argue that these two types of cases on a conceptual level correspond to two different modes of judicial reasoning, which I will call *judicial application* and *judicial interpretation*. Moreover, I will argue that every case starts and ends at the level of *judicial application*, but that some cases – i.e. the hard cases – will reach the higher level of *judicial interpretation*[17].

2.1 Judicial application

When a judge (or more general every jurist) is confronted with a concrete case in need of a legal solution, he will in a natural way start his legal reasoning by identifying the meaning of the set of relevant legal rules applicable to the case, that is to say the content of their scope of application and their legal consequences. He will then identify the relevant facts of the case and will subsequently reason whether these relevant facts can be brought under the scope of application of the relevant rules. If this is the case, the legal consequences of the relevant legal rules provide the definitive legal solution to the case[18]. If not, the legal rules and their legal consequences have no importance for the concrete case. The legal solution to the case will then be a no-right of the plaintiff towards the defendant,[19] unless the case can be brought under the scope of application of another legal rule with the result that the legal consequences of this other legal rule will apply. Lastly, if the judge finds that the concrete case can be brought under the scope of application of two or more different sets of legal rules yielding incompatible legal consequences, he will define a priority between these sets of rules by applying a second order legal rule or meta-rule which is especially designed to settle conflicts between incompatible rules. This very familiar mode of judicial reasoning can be labeled as *judicial application*, precisely because it is marked by its mere application of a legal rule to the specific factual circumstances of the case, without calling into question the meaning of that rule. Judicial application can therefore be described as a mode of judicial reasoning which analytically can be divided into three consecutive stages.

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[12] Compare with: M. BOROWSKI, "The structure of formal principles – Robert Alexy's law of combination" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (19) 28-29 and footnote 61; M. JESTAEDT, "The doctrine of balancing – its strengths and weaknesses" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (152) 156.

[13] Formal equality can be defined as the obligation that people in the similar relevant circumstances should be treated in the same way (S. GOSEPATH, "Equality" in *Stanford encyclopedia of philosophy*, http://plato.stanford.edu/archives/spr2011/entries/equality). Thus, the more strength given to this principle, the stronger will have to be the argument that the concrete relevant circumstances between two cases differ, for the cases not to be treated in the same way.

[14] H.L.A. HART, "Positivism and the separation of law and moral", *Harvard Law Review*, 71, 1958, (593) 614-615.

[15] R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 81-130; R. DWORKIN, *A matter of principle*, Cambridge Massachusetts, Harvard University Press, 1985, 74-75.

[16] H.L.A. HART, "Positivism and the separation of law and moral", *Harvard Law Review*, 71, 1958, (593) 606-608.

[17] Compare with: R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (9) 11.

[18] R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 24-25; R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 48.

[19] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 132-134.

The *first stage* consists of the determination of the *prima facie* meaning of the relevant legal rules. AARNIO defines this *prima facie meaning* of a legal rule as the plain *linguistic* meaning of that rule[20]. I will however use a slightly different definition which I think better grabs the way in which jurists identify legal rules at the start of their legal reasoning. With *prima facie* meaning, I understand in this context the meaning of the legal rule as it can be determined after a first (superficially) judicial enquiry of that rule. That is to say the meaning of a legal rule you will find when reading a basic legal textbook[21]. As legal rules are generally expressed in language, the linguistic meaning of the legal text comprising that legal rule will off course be very important for determining the *prima facie* content of a legal rule[22]. It will however not be the only relevant factor. When a judge applies a legal rule to a concrete legal case, he gives an authoritative account of the specific content of a legal rule in the specific circumstances of that case[23]. This implies that the more a legal rule is applied to diverse concrete cases, the more this history of judicial application will establish a finely meshed network of the specific meaning of the legal rule in diverse concrete circumstances[24]. As the legal rule grows older, this network will thus become more and more important for determining the meaning of a legal rule, with the result that the importance of the linguistic meaning of the legal text comprising the legal rule will slowly fade away to the background[25].

After having determined the (*prima facie*) meaning of the relevant legal rules, the judge will then identify the relevant circumstances of the concrete case, and will try to bring them within the scope of application of these rules. This is the *second stage* of judicial application. To this second stage corresponds a typical and well known form of judicial argumentation, namely the method of the *subsumption* of a case under a rule. Subsumption can be described as a logical deductive argumentation method having the form of a syllogism by which the specific circumstances of a concrete case are brought under the general legal concepts comprising the meaning of the relevant set of legal rules[26]. For example, imagine a simple case where A has premeditatedly stabbed B to death in a legal system containing a legal rule stating that murdering a person is punishable with lifetime imprisonment. In this simple case, the following reasoning will be open to the judge: A has premeditatedly stabbed B to death, premeditatedly stabbing a person to death is murder, murder is punishable with lifetime imprisonment, *ergo* A is punishable with lifetime imprisonment. Again, during this stage the judicial application history of the relevant set of rules will be very important in this process of subsumption. Indeed, because of the finely meshed network it generates, the judicial application history will provide for an argumentative bridge helping to connect the specific circumstances of the concrete case with the general rule. To return to but slightly modify the previous example: now A has poisoned B, but the police enquiry has failed to dig up sufficient evidence to directly prove beyond reasonable doubt that A acted premeditatedly. At first, our judge will be uncertain whether poisoning a person without proof of premeditation can considered to be murder, so the method of subsumption will not be open to him. However, imagine now that he finds an authoritative precedent stating that there is an (incontestable) presumption that the poisoning of a person always is a premeditated act. In this case, he will nonetheless be able to use a *three step* syllogistic reasoning to subsume the concrete case under the general murder rule: A has poisoned a person, poisoning a person always is (premeditated) murder, murder is punishable with lifetime imprisonment. Therefore, A is punishable with lifetime imprisonment.

In modern densely regulated legal systems, the previous two stages will likely yield the conclusion that the case can be brought under several sets of legal rules with at least partially incompatible legal consequences. If this is the case, judicial application will encompass a *third stage* where the priority between these different incompatible sets of legal rules will be determined. This usually will be done by bringing the incompatible sets of rules under a second order rule or meta-rule especially designed to settle conflicts between sets of

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[20] A. AARNIO, "Taking rules seriously", *Archiv für Recht und Sozialphilosophie*, Beihelf nr. 42, 1989, (180) 185. This does however not mean that this linguistic meaning will always be intuitively obvious. As SOLUM points out, sometimes *linguistic interpretation* – as contrary to what I will call judicial interpretation or in SOLUM'S words *construction* – will be necessary in order to uncover the linguistic meaning of a legal rule: L. SOLUM, "Unity of interpretation", *Boston University Law Review*, 90, 2010, (551) 569-572.

[21] J. RAZ, "Legal principles and the limits of law", *Yale Law Review*, 81, 1972, (823) 825-826.

[22] L. SOLUM, "The interpretation-construction distinction", *Constitutional Commentary*, 27, 2010, (95) 98-100.

[23] R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (9) 15.

[24] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 108; T. BUSTAMANTE, "Principles, precedents and their interplay in legal argumentation: how to justify analogy between cases?" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (63) 67-69.

[25] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 375-377. It should be noted that a similar fine meshed network can also come about when a legal rule is applied by other authorities. E.g., in administrative law, the network interpretive notes of administrative authorities (*circulaires*) will be important for civil servants when they apply administrative rules. And in contract law, when two parties have a continuous contractual relation, they will most probably revert to the way in which they have applied their contractual provisions before when they themselves interpret and apply a contractual provision. Nonetheless, these fine meshed networks will not have specific significance for judicial argumentation, because judges – who alone have the power to actually *enforce* a legal rule in case of a dispute – do not see themselves as principally legally (in *common law* systems) or *de facto* (in *civil law* systems) bound by these networks.

[26] R. ALEXY, "On balancing and subsumption. A structural comparison", *Ratio Juris*, 16, 2003, 433-435.

incompatible rules, like *lex superior derogat legi inferiori* or *lex specialis derogat legi generali*[27]. Therefore, this process could be called meta-subsumption[28].

This analytical division between these three consecutive stages however, need not to be overstated, as the later stages already will have an effect on the application of the former stages. The first and the second stage are indeed very closely related. On the one hand the specific legally relevant circumstances of the concrete case will already determine the relevant sets of legal rules the *prima facie content* of which will have to be established. On the other hand, it is precisely the *prima facie content* of the relevant sets of legal rules that determines which specific circumstances of the concrete case will be legally relevant in the first place[29]. So, the first and the second stage of judicial application are interdependent to a point that in practical reasoning, they will hardly be distinguishable. The same can be said of the third stage and the two previous stages, as the results of this third stage will already determine selection of the relevant sets of rules and specific circumstances of the concrete case during the two previous stages[30]. Nonetheless, since the type of argumentation applied during each of these three stages is conceptually different,[31] in my opinion, it still makes good sense to distinguish these three stages.

During each of these three stages, circumstances will sometimes arise where the judicial reasoning mode of *judicial application* will reach its limits and therefore will not be able to yield a result for the concrete case. During the first stage, this will be the case when the *prima facie* meaning of a legal rule remains unclear, that is to say – to use HART's words – has an open texture[32]. Such unclearness will usually occur when the legal texts comprising the set of legal rules is vague or ambiguous,[33] and plain linguistic interpretation[34] or the legal application history do not provide for a clarification. But it will also arise when there is a legal controversy on the issue having led to contrary case-law. During the second stage judicial application will reach its limits when the subsumption of the specific circumstances of the concrete case yields a result that is incoherent with legal doctrine or inconsistent with the legal principles underlying the legal system or legal branch. Finally, during the third stage, judicial application will reach its limits when various second order legal rules point to different relations of priority between two incompatible sets of legal rules,[35] or again when the priority established by these second order legal rules is incoherent with legal doctrine or inconsistent with the legal principles underlying the legal system or legal branch. In these circumstances, the judge will have to find a legal solution to the case by putting into scrutiny the *prima facie* meaning of the relevant set of legal rules itself. This is the second mode judicial reasoning which I will call *judicial interpretation*.

One immediately notices that the above mentioned types of arguments will bring about ample opportunities to call into question the *prima facie* meaning of a legal rule. This will especially be the case for the arguments that can be brought forward during the second (and to a lesser extent the third) stage of judicial application, i.e. the arguments that the application of the relevant legal rule to the concrete case will lead to incoherent or inconsistent results. Yet, it should be stressed that these opportunities are not completely unfettered. As ALEXY points out, legal rules by their very nature as a legal rule have a *prima facie definitive* character. This means that whenever a concrete case can be brought under the scope of application of a legal rule, the legal consequence of the rule *in principle* should definitively apply to the case[36]. And this can be endorsed. After all, if rules were not to have a principally definitive character, a judge would have to engage in an *ad hoc* balancing in every case (*Einzelfallgerechtigkeit*), which is clearly not the way the law operates in modern societies[37]. Nonetheless, as ALEXY again points out, given sufficient countervailing reasons, this definitive character of the legal rule can

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[27] R. ALEXY, "On balancing and subsumption. A structural comparison", *Ratio Juris*, 16, 2003, (433) 434-435.
[28] *Ibid.*, 434.
[29] Compare with: W. VAN GERVEN, *La politique du juge*, Brussels, Ed. Juridiques Swinnen, 1983, 67-68.
[30] In practice, judges will already keep the meta-rules which define the priority between the different rules in mind when they identify the relevant set of legal rules and subsume the facts of the case under these legal rules. This is because it would be pointless to complete the first and the second stage when the judge during the third stage has to concede that the concrete case falls under the ambit of another legal rule having priority.
[31] Identification of the *prima facie* legal meaning of the rule during the first stage; *subsumption* of facts under a legal rule during the second stage; and *meta-subsumption* of rules under second order rules during the third stage.
[32] H.L.A HART, *The concept of law*, 3th ed., Oxford, Oxford University Press, 2012, 124-136.
[33] On the difference between vagueness and ambiguity, see: R. POSCHER, "Ambiguity and vagueness in legal interpretation" in P.M TIERSMA en L.M. SOLAN, *The Oxford handbook of language and law*, Oxford, Oxford University Press, 2012, 128-144; L. SOLUM, "The interpretation-construction distinction", *Constitutional Commentary*, 27, 2010, (95) 97-100.
[34] As SOLUM points out, some problems of *ambiguity* can be solved by *linguistic interpretation* (L. SOLUM, "The interpretation-construction distinction", *Constitutional Commentary*, 27, 2010, (95) 102), with the result that the judge will in principle not have to engage in judicial interpretation.
[35] This will for example be the case when a later more general rule conflicts with an earlier more specific rule. In this case, the meta-rules *lex specialis derogat legi generali* and *lex posterior derogat legi priori* point in an opposite direction, with the result that meta-subsumption as such will not be open.
[36] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 53-56 and 364.
[37] Compare with: H.L.A. HART, "Positivism and the separation of law and moral", *Harvard Law Review*, 71, 1958, (593) 615.

itself be called into question. Hence a legal rule is only *prima facie* definitive[38]. This *prima facie* definitive character of legal rules thus precludes that the judge would always have to engage in judicial interpretation every time an argument is raised that the legal rule is unclear or leads to incoherent or inconsistent results. So, there must be legal principles providing for a minimal threshold for those kind of arguments[39]. And the type of legal principles that will provide for such a minimal threshold, are the formal principles. The first limiting aspect of formal principles to the competence of the judge to mold the legal rules he applies thus becomes clear: sometimes, legal rules will be able to prevent legal interpretation altogether and therefore judicial interpretation freedom.

2.2 Judicial interpretation

The second mode of judicial reasoning I distinguish, is *judicial interpretation*. As I already pointed out, a judge will typically only engage in judicial interpretation when the first mode of judicial reasoning, *judicial application*, does not yield a legal result to the concrete case, and formal principles do not preclude the judge from entering into this second mode. Therefore, this second mode of judicial reasoning will only come about in a minority of cases, which are generally referred to as *hard cases*. *Judicial interpretation* can be described as the mode of judicial reasoning by which the *prima facie* definitive character of the *prima facie* meaning of a legal rule is broken through, and the judge reverts to the legal principles underlying this *prima facie* meaning of that legal rule.

Whereas judicial application could analytically be divided into three stages, judicial interpretation can analytically be divided into two separate phases. During the first phase, the judge will try to determine the historic aims and purposes (*historic ratio legis*) of the legal rule. During the second phase, the judge will try to fit the legal rule into the actual present-day legal context of that rule. It should immediately be noticed, however, that these two phases will again be intertwined to a certain extent, since – as I will argue later – the actual importance of the historic *ratio legis* will also have an important role to play during the second phase. Nonetheless, I think it makes good sense to distinguish these two phases because they correspond to the two characteristics it is generally agreed on that legal interpretation has: a backward-looking conserving component and a forward-looking creative one[40].

During the *first phase* of judicial interpretation, the judge will thus try to determine the historic aims and purposes (*ratio legis*) of the legal rule. The main purpose hereof is to facilitate the assessment of the actual importance of the legal rule within the legal system. After all, whether it was created by a legislator or by case-law, a legal rule is a speech act. This implies that it was enacted for a certain purpose and with the idea in mind to bring about certain consequences. The same can moreover be said of the current *prima facie* meaning of a legal rule in as far as it already deviates from the words and intentions of the historic creator of that legal rule because of previous (evolutionary) judicial interpretations. Also these deviations were brought about for a certain purpose by previous judicial interpretations, i.e. to cope with certain changing social, economic or technological circumstances. It therefore seems to be a logical point of departure for judicial interpretation that the judge will try to uncover the principles the historic creator of the current *prima facie* meaning of the legal rule deemed relevant and the mutual weight he gave them, in order to determine the actual importance of these underlying principles[41].

As DWORKIN points out however, it will not always be straightforward to unravel the historic *ratio legis* of a legal rule[42]. Three main problems will be mentioned here. Firstly, a multitude of aims and purposes can underlie a single legal rule, some of which could even be incompatible. This first problem will especially arise when the legal rule was enacted by a legislative body consisting of multiple persons. As all these persons had their own personal aims and purposes for voting in favor of a legal rule, there is no logical necessity that these aims and purposes will coincide with each other, or even that a majoritarian set of aims and purposes underlying the legal rule could be identified[43]. Secondly, members of a legislative body will not only have aims and purposes for a

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[38] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 57-58. At this point, DWORKIN'S conception of legal rules clearly deviates from that of ALEXY. Where DWORKIN sees the *all-or-nothing* definitive character of rules as the key element separating rules from principles (R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 24-25; see also: J. RAZ, "Legal principles and the limits of law", *Yale Law Review*, 81, 1972, (823) 830) ALEXY sees the definitive character of rules as only *prima facie*, and thus open to doubt given sufficient countervailing circumstances (R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 58).

[39] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 50.

[40] J. DICKSON, "Interpretation and coherence in legal reasoning", *Stanford Encyclopedia of Philosophy*, 4, and further references there.

[41] Compare with: R. DWORKIN, *A matter of principle*, Cambridge Massachusetts, Harvard University Press, 1985, 22; R. DWORKIN, *Law's empire*, London, Fontana Press, 1986, 345-347.

[42] R. DWORKIN, *Law's empire*, London, Fontana Press, 1986, 315-316.

[43] *Ibid.*, 320-321.

legal rule, they also have expectations and hopes about the impact of the legal rule in practice[44]. Usually these aims and purposes will coincide with those expectations and hopes. Yet, under some circumstances, they could come apart. This could for example be the case when a legal rule was part of a political trade-off. In this situation, it seems not as farfetched that some members of the majority voted in favor of a legal rule they in principle do not agree with and even endorsed its underlying aims and purposes, but only because they expected or even merely hoped the legal rule only would become a paper tiger. So the question arises whether the judge should merely take into account the aims and purposes underlying a legal rule when interpreting a legal rule, or also the expectations and hopes of the legislator[45]. Thirdly and most notoriously, sometimes no purposes and aims regarding the application of a legal rule to the specific circumstances of the concrete case will be able to be identified, simply because the legislator did not think about these circumstances when he enacted the legal rule[46]. This can be demonstrated by making use of HART's famous 'no vehicles in the park' example[47]. Imagine that a local authority has enacted a rule forbidding motorized vehicles to enter a park. With this rule they aimed to keep motorcycles outside the park but to allow bicycles into the park. Now, the question arises whether electric bicycles may enter the park. In this simple example, no aim of the local authority on allowing electric bicycles into the park can be discovered, simply because it did not think about these when it enacted the rule.

So already at the level of the determination of the historic *ratio legis*, there will be *epistemic uncertainty* about the precise content of the historic aims and purposes underlying a legal rule that the judge has to take into account when interpreting a legal rule. This in turn leads to a certain interpretation freedom or discretion for the judge. This discretion will however not be unfettered. For some aims and purposes, it can indeed clearly be said that they underlie a certain legal rule whereas for other, it is undeniable that they do not make part of those aims and purposes. As this interpretation freedom is not unfettered but limited to those circumstances where different judges could reasonably disagree on these aims and purposes, it can be said that during this phase of judicial interpretation, judges enjoy what DWORKIN calls a *discretion in the weak sense*[48]. The interpretation freedom of the judge during this phase of legal interpretation thus will be limited to those concrete cases where the outcome of the interpretation of a legal rule will depend on the question whether a specific aim or purpose falls within the aims and purposes underlying this legal rule, and one can reasonably disagree about the answer to this question.

During the *second phase* of the process of judicial interpretation, the judge will try to fit the legal rule into the present-day legal context of the rule. This process of fitting the legal rule into its present-day legal context can be broken down into three steps[49]. Firstly, the judge will make a fresh assessment of the different historic aims and purposes (*ratio legis*) of the legal rule (relevant for the case) and their interdependent weight, in order to establish their actual relevance given the changed social, economic or technological circumstances. Secondly, the judge will determine the contemporary legal principles relevant to the rule. After having established actual relevance of the historic *ratio legis* and the contemporary legal principles, the judge will thirdly and finally *balance* the actual relevance of the historic *ratio legis* with these relevant contemporary legal principles. And the result of this *balancing* exercise will be the present day legal meaning of the legal rule. This equilibrium comprising the present day meaning of the legal rule will therefore be reflexive to changing social circumstances, since these changing circumstances will influence the weight of the underlying principles and therefore the outcome of the balancing exercise. A concrete example of Belgian case-law which can be seen as a fine illustration of this reflexivity of the meaning of a legal rule concerns the evolving case-law on the question whether the mistress of a victim to a crime has standing in court to claim personal damages. In Belgium, a legal rule (art. 17 *Code Judiciaire*) states that only persons having a *legitimate interest* have standing in court to claim damages. For decades, the Belgian Supreme Court (*Cour de Cassation*) decided that mistresses of a victim to a crime could not claim damages, because claiming damages presupposes the breach of a legitimate interest, and

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[44] *Ibid.*, 321-324.

[45] In my opinion, it cannot be accepted that judges should also have to take into account the expectations and hopes of the legislator when interpreting a legal rule. For this would actually imply that they would have to take into account the way in which the legislator expected they will interpret the legal rule. But if the legislators know judges will also take into account their expectations on how judges will take into account a legal rule, they will naturally also form expectations on how the judges will take into account their expectations on how judges will take into account a legal rule, which the judge then also needs to take into account. And so forth. Taking into account expectations would thus lead to a logically inacceptable vicious *infinite regress*.

[46] R. DWORKIN, *Law's empire*, London, Fontana Press, 1986, 325.

[47] H.L.A. HART, "Positivism and the separation of law and moral", *Harvard Law Review*, 71, 1958, (593) 607. In this example, HART takes the seemingly plain rule "*no vehicles in the park*" and asks the question whether this rule also forbids bicycles, roller skates, toy automobiles or airplanes to be taken into the park, with a view to exemplifying the difference between the core and penumbra of a rule.

[48] R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 31-32. DWORKIN makes a distinction between two sorts of discretion, discretion in the strong sense and discretion in the weak sense. Discretion in the strong sense means that an official is simply not bound by any standards when making a decision. Discretion in the weak sense means firstly that although there are standards the official must adhere to, he has the final authority to make a decision, and secondly that the official has to make a decision when reasonable people can disagree on the precise content of the standards he has to adhere to (*Ibid.*, 31-33).

[49] Compare with: R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 401 and R. ALEXY, "On balancing and subsumption. A structural comparison", *Ratio Juris*, 16, 2003, (433) 436-437.

mistresses could not be said to have such an interest[50]. In a judgment of 1 February 1989,[51] the court however completely reversed its case-law, and decided that mistresses have a legitimate interest to claim damages on an equal basis to all other relatives of the victim. So, on the basis of the same rule, the Belgian Supreme Court reached diametrically opposite results for the same concrete case, since – because of the changed social circumstances – it had given a different weight to the underlying principles relevant to the case (the principle of *access to court* and the principle *nemo auditor propriam turpitudinem allegans*[52]). Clearly, this kind of balancing exercise will bestow a considerable amount of interpretation freedom on the judge.

3. Balancing as the main spring of judicial interpretation freedom

Just as judicial application corresponds to the well-known judicial argumentation method of subsumption (see *above*), judicial interpretation thus also corresponds to a well-known form of judicial argumentation, namely that of *balancing*. Balancing can be described as an arithmetic scheme by which different competing principles can be put into each other's perspective and a *conditional* relationship of priority between them can be established[53]. As ALEXY stresses, this relationship of priority will always be conditional to the concrete case, as balancing can only be put into effect by taking into account the specific circumstances of the case[54]. Balancing will indeed establish the concrete weight of a principle relative to another principle by assigning values[55]. Firstly, to the intensity of the interferences with both principles,[56] and secondly, to the abstract weight of both principles[57]. The result of this allocation of values will be a kind of mathematical formula that determines the concrete weight of a principle relative to another principle:[58]

Balancing formula:[59]

$$W\ (i,j) = \frac{\mathrm{I(i).W(i)}}{\mathrm{I(j).W(j)}}$$

- i, j = competing principles
- W = weight of the principles
- I = interference with the principles

Admittedly, ALEXY developed this balancing formula with constitutional interpretation in mind, which is typically characterized by the idea of weighting one fundamental right against the other. So the question arises whether this balancing formula can be transplanted to the more common case of 'ordinary' legal interpretation. In my opinion, this certainly will be possible. As I argued earlier, the second phase of judicial interpretation can roughly be descripted as a three step process where the judge balances the actual relevance of the historic aims and purposes underlying the legal rule with the relevant contemporary (contradictory) legal principles. Moreover, as regards the first step, the actual relevance of the historic *ratio legis* can change over time, not only because the abstract weight of the principles propagated by that *ratio legis* has changed, but also because the assessment of whether the instance addressed by that *ratio legis* actually interferes with those principles making legal intervention necessary has changed. E.g., last decades in Belgium have been characterized by an increasingly narrow interpretation of the different offences against public decency[60]. Yet, this is not a result of

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[50] See e.g.: Cass. 16 January 1939, *Pas.* 1939, I, 25; Cass. 2 May 1955, *Pas.* 1955 I, 950; Cass. 19 December 1978, *Pas.* 1979, I, 472.
[51] Cass. 1 February 1989, *Pas.* 1989, I, 582.
[52] This civil law maxim can be translated as "*no one can be heard by the judge to invoke his own turpitude*".
[53] M. JESTAEDT, "The doctrine of balancing – Its strength and weaknesses" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (152) 155.
[54] R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 50-56.
[55] These values however do not have to be numerical. For example, ALEXY uses the non-numerical triadic valuation scheme of 'light', 'moderate' and 'serious' (R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 405-406).
[56] As ALEXY points out: "*The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"* (R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 102).
[57] In its monograph *A theory of constitutional right* ALEXY implicitly seemed to assume that all principles carry a comparable abstract weight (no mention of abstract weight is found in his early elaboration of the weight formula; see: R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 101-109), which was the subject of fierce criticism (see e.g.: M. JESTAEDT, "The doctrine of balancing – Its strength and weaknesses" in M. KLATT (ed.), *Institutionalized reason. The jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, (152) 163-165). In later articles, ALEXY however explicitly recognizes that different principles also can carry different abstract weight (see e.g.: R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (9) 11).
[58] R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (9) 10.
[59] Borrowed from: R. ALEXY, "On balancing and subsumption. A structural comparison", *Ratio Juris*, 16, 2003, (433) 446; the expansion of the balancing formula which includes the problem of epistemic uncertainty has not been adopted, as these elaboration seems not to be very important for the scope of present article (see: *Ibid*, 446-447).
[60] See: N. COLETTE-BASECQZ and N. BLAISE, "Des outrages publics aux bonnes moeurs" in H.D. BOSLY and C. DE VALKENEER, *Les Infractions. Vol. 3 : Les infractions contre l'ordre des familles, la moralité publique et les mineurs*, Brussels, Larcier, 2011, 251-297.

the diminishing abstract weight of the principle of public decency[61]. Indeed, offences which are still seen as an infringement of public decency, like exhibitionism, still generate similar disapproval and punishment. However, the instances in which the public decency is thought to be infringed, have decreased. The actual relevance of the historic *ratio legis* (c) will thus depend on the present-day abstract weight (W) given to the historic *ratio legis*, and the present-day assessment of the level of interference (I) the concrete case which is the object of interpretation is taken to have for that historic *ratio legis*. As regards the second step, as was already indicated above, the concrete weight of the relevant contemporary (contradictory) legal doctrines and normative principles, can also be analyzed in terms of level of interference (I) and abstract weight (W)[62]. The balancing formula therefore can also be used in the context of 'ordinary' legal interpretation, with only a slight adaptation:

Balancing formula, as adapted for 'ordinary' legal interpretation:

$$W\ (r,c) = \frac{\mathrm{I(r).W(r)}}{\mathrm{I(c).W(c)}}$$

- r = historic *ratio legis*
- c = contemporary contradictory principle
- W = weight of the principles
- I = interference with the principles

The interpretation of this balancing formula for 'ordinary' legal interpretation moreover is quite obvious. When the balancing formula yields a result greater than one [$Wr,c > 1$],[63] this means that the actual relevance of the historic *ratio legis* outweighs the contemporary (contradictory) principles[64]. So, the judge should interpret the legal rule which is the object of the interpretation in conformity with this historic *ratio legis*. When conversely the balancing formula yields a result lower than one [$Wr,c < 1$], this means that the actual relevance of the historic *ratio legis* will now be outweighed by the contemporary contradictory principles. So, when interpreting the legal rule, the judge now will have to depart from the historic *ratio legis* in order to cope with those contemporary (contradictory) principles.

The idea that the judicial argumentation method of balancing is an arithmetic scheme that can be written down as a kind of mathematical formula however, does not at all imply that the argumentation method of balancing will be as straightforward as applying mathematics. In fact, crucial to the application of this formula are the different values assigned to I and W. And the process of assigning these values will precisely be a normative process. This is clearest for the process of assigning values to the abstract weight (W) of to the different underlying principles. Evidently, people will assign different abstract values to a principle depending on their personal scheme of moral or political convictions. But also the process of determining the value of the interference (I) with a certain principle will partly[65] be a normative process. This can be clarified by the following example. The discussion about the legality of abortion does not revolve around the question whether the right to human life is unalienable – indeed both sides agree it is – but around the question whether aborting an embryo or fetus infringes this right to life. So, the judicial argumentation method of balancing and thus judicial argumentation itself is firmly tied to normative reasoning.

Needless to say, during most normative discussions people will reasonably disagree about the precise meaning and content of a specific moral obligation. The second phase of judicial interpretation therefore will generate a multitude of epistemic (normative) uncertainty leading to an important interpretation freedom or discretion for the judge[66]. Similar to the first phase of judicial interpretation however, this discretion will again not be completely unlimited. This will firstly be the case as for some interpretations it could not reasonable be held that

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[61] This surviving abstract weight is also confirmed by the European Court of Human Rights in its recent judgment *Gough v. UK*, where the Court unanimously held that the various criminal convictions for offences against public decency for a 'nudity activist' did not infringe articles 8 or 10 ECHR: ECtHR 28 Octobre 2014, *Gough v. UK*, no. 49327/11.

[62] Note that it is also possible that substantive principles are found which call for a *status quo* interpretation of the legal rule, but do not already make part of the *ratio legis* of the legal rule. When this is the case, the concrete weight of this substantive principle is added to the teller of the balancing formula. However, since this hypothesis only lengthens the balancing formula but does not introduce any additional conceptual problems, I will further leave aside this hypothesis.

[63] This threshold of one only is a relative threshold. It can therefore without any modification also be used when non-numeric values would be applied in the balancing formula: see *above*, at footnote 55.

[64] Note that at least theoretically, the balancing formula can also yield a result exactly equal to one. ALEXY identifies this situation as a structural *stalemate* (R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 407-414). I will leave this problem of a structural stalemate of substantive principles for the moment. But later in my argument, it will be clarified that in this situation, the result of the balancing formula will completely be determined by the concrete weight of the formal principles involved.

[65] It will also partly be an empirical process, with the result that there will also be a certain amount of empirical uncertainty present in the judicial argumentation method of balancing. See: R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 414-415; R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, (9) 10.

[66] J. RAZ, "Legal principles and the limits of law", *Yale Law Review*, 81, 1972, (823) 846-848.

they are substantiated by logically sound or socially acceptable normative reasoning[67]. Secondly and more importantly, *formal principles* will again limit the power of the judge to mold the meaning of a legal rule to the contemporary legal principles. Indeed, the more strength given to the formal principles of *formal equality*,[68] *legal certainty* or *integrity*[69] for example, the more the judge will find himself tied to the (principles underlying the) application history of the legal rule when interpreting this rule. And the more strength given to the formal principle that it is for the legislator – and not the judge – to determine the important normative choices in society, the more the judge will find himself bound to the historical aims and purposes (the historic *ratio legis*) of the legislator.

4. Formal principles as a limitation on judicial interpretation freedom

Formal principles thus clearly impose a certain limit on the scope of judicial discretion of the judge, by tying the legal meaning of a legal rule to its actual words or legal application history, or to the precedents in cases similar to the case under scrutiny. Consequently, the more strength given to one or more formal principles, the less the scope of judicial discretion will be. E.g., for DWORKIN, who sees the *principle of integrity* as the dominant all-encompassing principle underlying the contemporary Anglo-Saxon legal order (*law is integrity*), judges will have no discretion, as the outcome of every case will have one single answer,[70] the answer *integrity* dictates[71]. Moreover, previous description also shed some light on the two different ways in which formal principles can limit judicial interpretation freedom. Firstly, formal principles can preclude the legal reasoning mode of judicial interpretation altogether. Secondly, even if formal principles are lacking the strength to preclude judicial interpretation, they still can exclude some interpretative solutions during the process of legal interpretation. In this section, I will dig deeper is this twofold limiting force of formal principles to judicial interpretation freedom. I will however also elaborate on a third and more peculiar aspect of formal principles. Even if their primary purpose is to limit the scope of judicial interpretation freedom, in some instances the application of formal principles can actually increase the discretion of the judge.

4.1 Formal principles can preclude judicial interpretation

Firstly, formal principles will play an important role as *gatekeepers* of the process of legal interpretation. And they will do this in two different ways. On the one hand, the concrete strength given to them will determine the minimal strength the argument about the unclearness of the legal rule or the unacceptability of the consequences of applying the legal rule, will need to have in order to trigger the process of legal interpretation. Thus, the more strength given to a formal principle in the specific situation at hand, the stronger the arguments of unclearness or unacceptability will have to be in order to outweigh that formal principle. A first example of such a formal principle, is the principle of the *separation of powers* and the priority of the legislative. The more strength given to this formal principle, the more the judge will find himself bound to the actual words of the texts comprising the legal rules and the stronger the argument will have to be in order for the judge to engage in judicial interpretation[72]. Other examples of such formal principles are the principle of *formal equality* and the principle of *legal certainty*. These principles tie the judge to the legal application history of a legal rule. Thus again, the more strength given to these formal principles, the stronger the argument will have to be for the judge to consider departing from settled case-law and engaging into judicial interpretation. The structure of a formal principle nonetheless does not deviate from that of any other principle (see *above*). This implies that the concrete strength of a formal principle will again be determined by its abstract weight multiplied by the seriousness of the

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[67] *Ibid*., 847-848.

[68] The principle of formal legality calls for cases who share similar (comparable) specific circumstances to be treated in the same way (see *above*, at footnote 13). As ALEXY points out in a recent article, this corresponds to a third form of judicial argumentation, namely legal analogy (R. ALEXY, "Two or three" in M. BOROWSKI (ed.), "On the nature of legal principles", *Archiv für Recht und Sozialphilosophie*, nr. 119, 2010, 9-18). This form of judicial argumentation demands for similar cases to be treated equally, unless there can be identified sufficient countervailing principles relevant to the one case but not to the other, who call for a different treatment. Immediately the relation between the formal principle of formal equality and the substantive doctrines and principles underlying the case becomes clear: the more strength given to the principle of formal equality, the stronger will have to be the countervailing doctrines and principles for a case in order to be treated differently from a similar case.

[69] DWORKIN views the principle of integrity as an autonomous all-encompassing principle having the following meaning: "*Propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice*" (R. DWORKIN, *A matter of principle*, Cambridge Massachusetts, Harvard University Press, 1985, 225).

[70] R. DWORKIN, *Taking rights seriously*, Cambridge Massachusetts, Harvard University Press, 1978, 279-290.

[71] See: R. DWORKIN, *Law's empire*, London, Fontana Press, 1986, 225-275.

[72] MONTESQUIEU's famous quotes on the task of the judiciary in the ideal form of government he calls a *republic*, can be seen as a legal theory where overriding importance is given to the principle of the separation of powers and the priority of the legislative: "*les juges suivent la lettre de la loi*" (C. MONTESQUIEU, *L'esprit des lois*, Geneva, Chatelain, 1748, VI, 3) and "*Les juges de la nation ne sont que les bouches qui prononces les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*." (C. MONTESQUIEU, *L'esprit des lois*, Geneva, Chatelain, 1748, XI, 6).

interference. Therefore, borrowing form the balancing formula developed above, the precluding strength of a formal principle can be represented as follows:

Precluding strength of a formal principle:
An argument of unclearness or unacceptability will trigger judicial interpretation if and only if:
$A_{(Uncl., Uncert.)} > [I(f).W(f)]$
- $A_{(Uncl., Uncert.)}$ = argument of unclearness or unacceptability
- f = formal principle
- W = abstract weight of the formal principle
- I = seriousness of the interference with the formal principle

On the other hand, formal principles can also deny the validity of certain arguments of unclearness or unacceptability with regard to the process of judicial interpretation[73]. When this is the case, a certain type of arguments will never be seen as a strong enough reason to engage in legal interpretation[74]. A simple example of Belgian criminal law can again illustrate this second precluding effect of formal principles. In Belgium, a rule is derived from the formal principle of legality in criminal law (*nullum crimen sine lege*) that a criminal law provision can never be applied *per analogiam* to the detriment of a suspect[75]. This implies that no matter how strong and convincing the argument would be that the current network of criminal provisions leaves an unacceptable gap with the result that a suspect will be acquitted, this argument will never lead to the application of a neighboring criminal provision to the suspect *per analogiam*. Therefore, the principle of legality denies any validity to the argument of unacceptability in order to trigger the process of judicial interpretation, when this would lead to the application of a criminal provision to the suspect by analogy.

4.2 Formal principles can limit judicial interpretation

Secondly, even when a formal principle is lacking the strength to preclude judicial interpretation, it will sometimes still be capable of limiting the scope of judicial interpretation freedom. And it will do this by tying the judge to the historic *ratio legis* of the legal norm creator or the (principles underlying the) application history of the legal rule. During the second phase of the process of legal interpretation, formal principles thus represent the conservative aspect we argued is inherently present during the process of legal interpretation. Moreover, they do this by inflating the actual concrete weight of the historic *ratio legis* uncovered during the first phase of legal reasoning, when it is balanced with the contemporary (contradictory) legal principles that takes place during the second phase (see *supra*). In other words, the more strength given to formal principles during that balancing, the more the contemporary (contradictory) legal principles will have to outweigh the actual concrete weight of the historic *ratio legis* in order for the judge to depart from the historic meaning of the legal rule and to give it a new legal meaning. Again borrowing from the balancing formula developed above, this limiting aspect of formal principles can thus be represented as follows:

Limiting strength of formal principles:
A judge can depart from the meaning of a rule as it follows from its historic *ratio legis* if and only if:
$\frac{[I(r).W(r)]+[I(f).W(f)]}{I(c).W(c)} < 1$[76]
- r = historic *ratio legis*
- f = formal principle
- c = contemporary contradictory principle
- I = interference with the principle
- W = abstract weight of the principle

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[73] As ALEXY points out, this actually means that a 'formal rule' is present in the core of the formal principle preventing all possibilities of legal interpretation on the basis of certain arguments of unclearness or unacceptability: R. ALEXY, *A Theory of constitutional rights*, Oxford, Oxford University Press, 2002, 62-64. In the model of legal reasoning constructed in this article, this would conceptually mean that the interpretation of the legal rule contrary to this formal rule would be uncovered during the first two stages of judicial application, only to be excluded as valid meaning of the legal rule afterwards during the third stage thereof. I however argued that the results of this third stage already influence the two previous stages (see *supra*). Hence, to simplify the model, I will take a formal principle that is capable of excluding the validity of certain arguments as a formal principle that approaches an infinite abstract weight, thus already preventing the leap into judicial interpretation during the first two stages of judicial interpretation.

[74] Applying the balancing formula, this means that the abstract weight of the formal principle involved approaches infinity [$W(f) = \infty$]. Thus, whenever an argument of unclearness or unacceptability would lead to any interference with the formal principle [$I(f) > 0$], the infinite abstract weight of the formal principle will preclude all interpretation, no matter how strong that argument is.

[75] F. KUTY, *Principes généraux du droit pénal belge. Tome 1 : la loi pénale*, 2nd ed., Brussels, Larcier, 2009, 225-232.

[76] Although I shall not dwell on this much further, it can thus be noted that the judge will not be able to depart from the historic *ratio legis* when the result of the balancing formula taking into account formal principles is equal to one. This can be explained by the fact that legal interpretation takes the historic *ratio legis* as the point of departure. The argumentative burden therefore lies on the departure from this established historic *ratio legis*.

This formula also clarifies the precise limiting influence of formal principles to judicial interpretation. In fact, the application of formal principles actually increases the concrete weight of the historic *ratio legis* when it is balanced against contemporary contradictory principles during the process of legal interpretation. Consequently, they will sometimes be able to prevent departure from the historic *ratio legis*, thus decreasing judicial interpretation freedom. This will be the case when the concrete weight of the relevant formal principle added to the concrete weight of the historic *ratio legis* outweighs the concrete weight of the contemporary (contradictory) principles, whereas the historic *ratio legis* on its own would have folded to these contemporary principles[77]. But even when the concrete weight of the formal principles does not wield enough strength to prevent departure from the historic *ratio legis* altogether, formal principles can nonetheless still limit the scope of judicial interpretation freedom by excluding some interpretative options. And the reason why they are capable of doing is, can be explained as follows. Until now, for the sake of keeping the argument simple, I implicitly assumed that interpretation can yield only a bipolar result: one possible interpretation in conformity with the historic *ratio legis*, and one possible interpretation that departs from the historic *ratio legis*. However, during a real life interpretation exercise, there will most of the time be a myriad of possible alternative interpretations to the one in conformity with the historic *ratio legis*. As these alternative interpretations all will bring about different concrete levels of interference (I) with the different principles involved, they will moreover all yield different balancing formulas. Formal principles will therefore again be able to limit the scope of judicial interpretation freedom by excluding some alternative interpretations as possible interpretative options[78]. For example, imagine a legal system where a formal principle of *proportionality* is applied during the process of judicial interpretation, meaning that a judge may not depart further from the historic *ratio legis* of a rule than what is strictly necessitated by the countervailing contemporary (contradictory) principles. The application of this formal principle will thus exclude any alternative interpretation which aspires a contemporary (contradictory) principle as well as another alternative interpretation, but encroaches deeper on the historic *ratio legis* than the alternative[79].

4.3 Formal principles can increase judicial interpretation freedom

I will now turn to the last and more peculiar aspect of formal principles. Although they are designed to limit judicial discretion, they actually sometimes are also capable of *increasing* this discretion. And the reason why they are capable of doing this, is not hard to see, given what was said about substantive principles. Just as substantive principles, formal principles too can become the object of a reasonable disagreement in legal society about their precise meaning and therefore the exact limits they impose on the judge in a concrete case. So paradoxically, although formal principles in essence have the purpose of limiting the judge's discretion, they can also to a certain extend *increase* the interpretation freedom of the judge, in as far as there is reasonable disagreement about the precise meaning of a formal principle or its precise consequences for the concrete case. E.g., when in a concrete case the principle of *legal certainty* is invoked in order to preclude the judge from entering into judicial interpretation, the question can surge whether in this concrete case the principle of legal certainty really is a decisive reason for upholding the *prima facie* definitive character of the relevant set of legal rules. And this question can in turn have as a result that the formal principle of *legal certainty* itself will become the object of legal interpretation, leading to epistemic uncertainty about its precise scope and therefore to increased judicial discretion.

5. Conclusion

Corresponding to the classical distinction that is made between *easy* and *hard* cases, two modes of legal reasoning can be identified: legal application and legal interpretation. These two modes of legal reasoning however do not function independent of each other. Judicial application can be seen as the default mode of judicial reasoning, so each case will start and end with judicial application. And as far as easy cases are concerned, there will be nothing in-between. When legal application does not yield a clear or acceptable result however, a second mode of legal reasoning will kick in, judicial interpretation. Judicial interpretation will clarify or (re-)draw the legal boundaries of a legal rule, with the result that a renewed legal meaning of a legal rule will be established. And this renewed legal meaning will then become the point of departure for a new round of judicial application. This whole process of legal reasoning is graphically illustrated in the annex below.

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[77] Applying the balancing formula, this means that $\frac{[I(r).W(r)]+[I(f).W(f)]}{I(c).W(c)} > 1$; whereas $\frac{I(r).W(r)}{I(c).W(c)} < 1$.

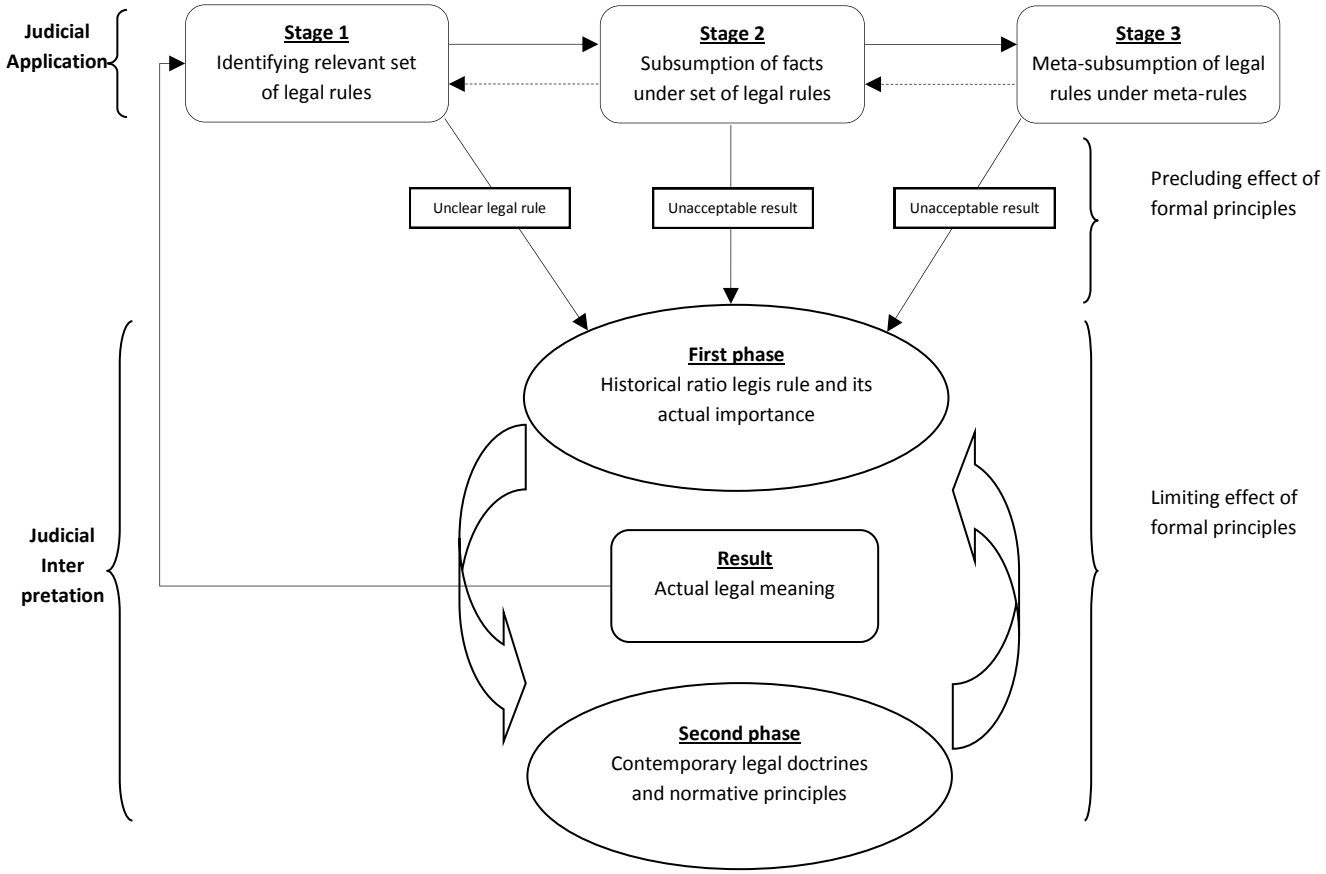
[78] Applying the balancing formula, an alternative interpretation will be excluded when for that interpretation: $\frac{[I(r).W(r)]+[I(f).W(f)]}{I(c).W(c)} > 1$.

[79] Again applying the balancing formula, this means that an alternative interpretation (A) will be excluded by the formal principle of proportionality with regard to another alternative interpretation (B), whenever the nominators of (A) and (B) [I(c).W(c)] are equal, but the teller of (A) [I(r).W(r)] is greater than the teller of (B) [I(r).W(r)], and *vice versa*.

This model of legal reasoning also identified the various sources of judicial interpretation freedom. Firstly, even during the judicial reasoning mode of judicial application, a judge will already have a certain amount of discretion whenever there is epistemic uncertainty and thus reasonable disagreement on whether a legal rule is unclear or yields an unacceptable result. This first kind of judicial discretion however is limited to the decision whether or not to engage in the second mode of judicial reasoning, *judicial interpretation.* Secondly, during the judicial reasoning mode of judicial interpretation, two sources of judicial interpretation freedom can be identified. On the one hand, when trying to uncover the historic *ratio legis* during the first phase of judicial interpretation, the judge will have discretion insofar as there is epistemic uncertainty and therefore reasonable disagreement on the precise aims and purposes the historic legal norm creator had for enacting that legal rule. On the other hand, the method of balancing during the second stage of legal interpretation will yield a multitude of epistemic uncertainty and consequently judicial interpretation freedom. It can therefore be said that the balancing of underlying principles of a legal rule is the main spring of judicial discretion. Needless to say, whenever a judge has discretion because there is reasonable disagreement about the content of the legal norms he has to apply, he has ample maneuvering space to base his judgment on extralegal policy considerations.

This judicial discretion however, is limited be the existence of formal principles. The model of legal reasoning also identified the different ways in which these formal principles limit judicial interpretation freedom. Firstly, formal principles are the gatekeepers to the judicial reasoning mode of judicial interpretation. Playing this role, they thus can limit judicial discretion by cutting off access to the main spring of this freedom, the method of balancing. Secondly, during judicial interpretation they to a certain extend also can limit judicial interpretation freedom by tying the judge to the historic *ratio legis* of the legal rule under scrutiny, or alternatively by excluding some alternative interpretations. It can therefore be said that the subtle interplay between substantive and formal principles will determine the amount of judicial discretion, and hence the degree to which policy considerations have a role to play in a legal system or a legal branch.

Annex: Graphical illustration of judicial reasoning[80]



[80] The dotted lines in the graphical representation of *judicial application* illustrate the effect the later stages already exert on the former stages.

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